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COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

STEVEN P. KOZOL, LARRY BALLESTEROS,
KEITH CRAIG, and KEITH BLAIR,

Appellants,

v.

JPAY, INC.,
a foreign corporation,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Respondent, JPay, Inc., (“JPay”) requests that this Court affirm the Orders of the Trial Court. JPay is a Delaware corporation with its principal place of business in Florida. JPay has contracts with numerous government entities to provide a variety of corrections-related services for incarcerated offenders. Services/products offered by JPay include funds transfers, communications (*e.g.*, e-mail and video visitation), and media (*e.g.*, digital players with available music and video game downloads).

One of JPay’s government contracts is with the Washington State Department of Corrections (“DOC”). JPay contracted with DOC to make digital players and music downloads available to offenders. One model of digital player that JPay made available to offenders in Washington was known as the JP3. JPay sold thousands of JP3s in Washington to DOC offenders, including the Appellants. Each Appellant in this case is incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington and purchased his JP3 in 2012.

All JP3 purchasers are required to agree to an electronic User Agreement as a condition of buying a JP3. The User Agreements reflect that JP3s were sold with a limited warranty. Limited warranties associated

with JP3s warn that JP3s are not guaranteed “to operate without failure.” Limited warranties associated with JP3s were anywhere between a few months to one year in duration. JPay promised to repair JP3 players that malfunctioned during the warranty period or replace them with a product of equal or greater capacity and functionality.

Appellants all had JP3s that functioned properly for more than a couple of years. But each of Appellants’ JP3s reportedly malfunctioned in a similar way between May and June 2015. When each Appellant respectively informed JPay of his issue with his JP3, the warranty period had been long expired. With no warranty in place, JPay had no obligation to repair or replace Appellants’ JP3s. As such, JPay advised each Appellant that he could purchase a new player if certain troubleshooting techniques did not remedy the situation—at the time this recommendation was made, new model players called JP4s were available for purchase and JP3s had been discontinued. JPay offered the same recommendation to other offenders in positions similar to Appellants.

In Appellants’ Briefs, they refer multiple times to the Declaration of Ronnie Bowman. Mr. Bowman, a fellow offender, states that he purchased a JP3 in 2011. He goes on to state that he witnessed “widespread” problems

with JP3s locking up. He states that JPay technicians were able to fix the problems with relative ease. However, Mr. Bowman fails to indicate whether the problems and fixes that he allegedly witnessed occurred before or after JPay had introduced JP4 model players.

There is no dispute that JP3s did not operate without failure. Even Appellant Steven Kozol had at least two JP3s replaced prior to the JP3 that malfunctioned and is at issue in this case. Mr. Kozol's two prior JP3s were replaced in or before 2012, which was before JP4s were available. Mr. Kozol has stated on the record that his first JP3 frequently crashed due to alleged software issues. The point is, JPay routinely repaired JP3s or replaced JP3s with other JP3s prior to the time when JP4s were rolled out. But once JP4s were rolled out, JPay no longer serviced JP3s and/or had new JP3s in stock to replace the old players.

There is no requirement for a digital/tech company to manufacture a product that will operate forever without problems. There is no requirement for a company to offer a lifetime warranty for maintenance and/or replacements. And there is no requirement for a company to continue producing and servicing the same model of product forever—companies are allowed to innovate and evolve. Here, JPay rolled out a new

model digital player called the JP4 and has since rolled out a JP5. JPay has decided not to produce more JP3s and has decided not to service existing JP3s, which are now all beyond their warranty periods. Thus, when a JP3 player malfunctions at this point in time, the only option for a JPay customer who desires to continue utilizing JPay's services is to upgrade to a new model player. This is the option Appellants and others were given in early-to-mid 2015.

JPay did not know the cause of Appellants' JP3 problems when Appellants were advised to purchase new model players. JPay only knew that Appellants' JP3s were a few years old and were subject to fail—for example, like Mr. Kozol's previous JP3s had failed in the past. However, the number of offenders reporting JP3 issues grew as 2015 went along. In July 2015, JPay determined that new software designed for JP4s was causing many of the JP3 malfunctions—JP3s and JP4s are plugged into the same kiosks for downloading and unlocking. Based on the revelation that new software was likely the cause of problems with JP3s, JPay made the decision to offer free upgrades from JP3s to JP4s for any offender with a JP3 player that experienced a malfunction. Further, JPay provided an account credit to offenders who had already purchased a JP4 after having a

JP3 malfunction.

JPay's profits are primarily made by selling digital downloads—not by selling the players themselves. There is no reason why JPay would intentionally sabotage any of its player models and thereby interrupt the ability of users to download content. And there is no reason why JPay would single out the Appellants if JPay were repairing other offenders' JP3s. Appellants' conspiracy theories are in their heads and those theories are not supported by evidence. The truth is simple: new software for new model players inadvertently conflicted with some JP3s; JP3s that could be repaired with simple troubleshooting techniques were repaired; unrepaired JP3s were exchanged for newer model players regardless of the warranty status of the JP3s; and the player exchanges/upgrades were free.

Appellants were offered the same deal as everyone else—*i.e.*, they were told they could purchase new JP4s (with the purchase price later credited to their account) or they were offered free JP4s. But instead of being happy with this great technology to use while imprisoned, Appellants complained about things such as JP4s being a few ounces heavier than JP3s. Appellants were eventually given special, refurbished JP3s because of Appellants' persistence, but the refurbished JP3s were also incompatible

with new software. Appellants were ultimately provided with JPay's newest model of player, the JP5, and JPay now has records of Appellants downloading the content purchased for their JP3s onto the JP5s and also of Appellants purchasing new downloads. This case seems to be more about Appellants wanting a project to occupy their time and/or a scam for money than it is a legitimate legal claim or quest for a working digital player.

Appellants cannot force JPay to continue servicing and/or producing JP3s forever. JPay's response to the JP3 malfunctions at issue in this case was imminently reasonable. Appellants have not proven any breaches of duties, statutes, or contracts. And Appellants have not proven any damages. Appellants' case fails as a matter of law and the Trial Court's decision to dismiss this case on summary judgment should be affirmed. This case is a gross abuse of the justice system carried out by individuals with no respect for the law and who have nothing to lose. The Trial Court was correct to dismiss this case.

II. STATEMENT OF THE CASE

A. Facts.

The relevant facts in this case were set forth in JPay's Motion for Summary Judgment filed on January 25, 2016. CP 90-97. JPay's

dispositive motion was supported by the Declaration of JPay Compliance Officer Shari Beth Katz. CP 84-89 and 563-583. JPay's dispositive motion was also supported by averments in Appellants' Complaints and various documents that were part of the record (*e.g.*, JP3 Instruction Manual, portions of JPay's contract with DOC, and limited warranty). CP 563-583, 424-435, and 461-462. Those facts are part of the record before this Court and will not be restated here *ad nauseum*. *See, e.g.*, CP 90-97.

The highlights are as follows:

- Appellants are each incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington, and received their subject JP3s in 2012. Their JP3s stopped working in May or June 2015, which was after limited warranties associated with the JP3s had expired. CP 90-91.
- Appellants do not allege in their Complaints that JPay had any contract with them and Appellants do not allege breach of contract as a cause of action. The only contract referenced in Appellants' Complaints is JPay's contract with DOC. Appellants' Complaints conveniently ignore the applicable User Agreements and Limited Warranties. CP 91-94.

- JPay complied with its DOC contract. JPay also complied with the terms of its User Agreements and Limited Warranties. CP 90-97.
- In the first six months of 2015, thirty-three offenders in Washington who had purchased JP3s reported their players had malfunctioned. In July 2015, another fifty-two offenders reported malfunctions. With the increasing number of malfunctions, JPay was able to determine that new software designed for new model players was causing many of the malfunctions. CP 94-95.
- Once JPay discovered that new software was the likely issue for malfunctions, JPay offered any offender with a malfunctioning JP3 a free upgrade to a newer model player regardless of warranty status. Offenders who had already purchased new model players were given a credit to their JPay accounts. In October 2015, for example, 107 JP3s were reported as malfunctioning so that offenders could receive a free upgrade. CP 95.
- JPay has completely discontinued JP3s. Newer models are being sold instead of JP3s. CP 95.
- Within a couple of months of Appellants reporting JP3 malfunctions, JPay was able to discover the cause of malfunctions

and offered Appellants a free upgrade to a player that would play the same music Appellants had previously downloaded on their JP3s. CP 95-97.

After the Trial Court granted JPay's Motion for Summary Judgment, Appellants filed a Motion for Reconsideration. CP 131-156. Arguments included in Appellants' Motion for Reconsideration are entirely speculative and include theories such as, "it is certainly possible that a disgruntled JPay employee intentionally 'malfunctioned' or 'deactivated' [Appellants'] JP3s...it is certainly possible that JPay could have been operating off a list of JP3s that were to be intentionally 'malfunctioned' for inmates who wished to buy new players or whose players were lost or stolen, but somehow the [Appellants'] JP3 devices were erroneously included into this group." CP 135. There is no legal analysis explaining why JPay would be liable for more than offering free upgrades to new model players even assuming a rogue employee or an administrative error caused the malfunctions instead of incompatible software. CP 131-156.

Appellants' Motion for Reconsideration was also supported by several Declarations of offenders who made statements about their issues with their own JP3s or how their JP3s actually continued to work despite

others malfunctioning. CP 232-242. This testimony was not new evidence and is not relevant to the fact that many offenders had their JP3s impacted by apparent software incompatibility issues. CP 495-500. Another Declaration submitted on Appellants' Motion for Reconsideration was the Supplemental Declaration of an offender who baldly claimed he had some expertise that would enable him to "compose a comprehensive report, which then can be forwarded to another expert hired by the [Appellants] who can confirm and expand upon my expert evaluation." CP 229. Appellants' Motion for Reconsideration was supported by their own Declarations attempting to provide evidence of alleged personal injury type damages in the form of self-serving statements without any real evidence of medical/clinical support. CP 214-225. Finally, Appellants' Motion for Reconsideration was supported by the Declaration of Steven Kozol, which included exhibits portraying his alleged musical talents and contained several unconfirmed Internet articles. CP 157-212.

JPay responded to Appellants' Motion for Reconsideration. CP 495-500. Regardless of whether the Declarations supplied by Appellants on reconsideration was new evidence, the evidence was mostly irrelevant and entirely unpersuasive. CP 495-500. The Trial Court denied Appellants'

Motion for Reconsideration. CP 512.

Appellants' Opening Briefs rely heavily on the untimely and irrelevant evidence submitted with Appellants' Motion for Reconsideration; for example, citing cherry-picked Internet articles for the proposition that JPay is an unscrupulous company. *See, e.g.*, Opening Brief of Larry Ballesteros, Keith Craig, and Keith Blair at page 6. And like Appellants' previous pleadings, the Opening Briefs attempt to construe self-serving and conclusory opinions as facts; for example, the assertion in a "Statement of Facts" that "Recognizing that it was an unfair business practice for JPay to 'unassign' and 'lock' his JP3 device..." *See, e.g.*, Opening Brief of Larry Ballesteros, Keith Craig, and Keith Blair at page 9. The Opening Briefs are over eighty pages of useless diatribe as no new and/or intelligible arguments are presented. *See* Opening Briefs.

B. Procedural Background.

1. Appellants' Claims.

Appellants' two Complaints collectively assert the following causes of action: (1) Common Law Fraud; (2) Negligent Misrepresentation; (3) Consumer Protection Act; (4) Tortious Interference; (5) Trespass; (6) Conversion; (7) Estoppel; (8) Declaratory Judgment; and (9) Injunctive

Relief. But boiled down, there are essentially only a couple of theories: (1) JPay charges too much for downloads; and (2)(a) JPay intentionally caused Appellants' JP3s to malfunction; and (2)(b) treated Appellants unfairly when Appellants requested assistance in getting a player that worked. CP 6-16 and 543-554.

Appellants ignore applicable User Agreements and Limited Warranties—conspicuously missing from Appellants' claims is any breach of contract or UCC cause of action. CP 6-16 and 543-554. Further, the claims Appellants do assert are all based on Appellants' maniacal speculation—there is absolutely no admissible evidence that JPay intentionally caused JP3s to malfunction or that prices are too high. *See, e.g.*, CP 90-111.

2. Motions Practice.

The undisputed admissible evidence in this case is that JP3 malfunctions were inadvertent and all JP3 users were treated the same. Moreover, JPay offered free upgrades to new model players once JPay discovered the likely cause of so many JP3 malfunctions—and users who had previously paid to upgrade had credits deposited into their JPay accounts. The overriding theme of JPay's legal arguments based on the

relevant and admissible evidence is this: JPay acted at all times in a commercially reasonable manner. CP 84-89 and 90-111.

An early Motion for Partial Summary Judgment brought by Appellant Steven Kozol was denied. CP 4548-459. Similarly, the Trial Court denied a 12(b)(6) Motion to Dismiss filed by JPay. CP 479-480. Numerous discovery requests propounded by Mr. Kozol were responded to with answers, document production, and/or objections. *See, e.g.*, CP 361-367. Thereafter, JPay moved the Trial Court for summary judgment dismissal of the claims; Appellants' cases had been consolidated prior to JPay filing its Motion for Summary Judgment. CP 90-111 and 555.

In addition to filing a Response to JPay's Motion for Summary Judgment, Appellants filed Motions requesting a continuance pursuant to CR 56(f) and an Order Compelling Additional Discovery Responses and Deposition Attendance. CP 247-337, 124-130, and 338-375. The Trial Court granted JPay's Motion for Summary Judgment dismissing all claims and denied Appellants' Motions. CP 506-511. Appellants moved for Reconsideration, which the Trial Court also denied. CP 512.

3. Appeal

Appellants have filed two Opening Briefs, which collectively

contain over eighty pages of text. Approximately twenty-eight pages of argument is contained in one brief with approximately forty-three pages of argument in the other brief. The remaining pages state issues and alleged facts. The two Opening Briefs cite a total of eighty-one distinct cases plus statutes and court rules. Appellants' Briefs identify seven alleged errors by the Trial Court and seventeen issues purportedly dealing with alleged errors.

Appellants' Opening Briefs consist largely of: (1) black-letter law defining elements of claims regurgitated from inapplicable cases and without any relevant analysis; (2) references to self-serving Declarations and/or Declarations that lack foundation; and (3) the opinions of Appellant Steven Kozol, which are couched as legal argument but that are not based on the admissible evidence and/or relevant law. Appellants ostensibly seek to have the Trial Court's Orders reversed so that Appellants can conduct additional discovery and try their case to a jury; Mr. Kozol has advised the Trial Court that this case might take two or three weeks to try before a jury. Appellants also seek costs and fees on appeal—the request for fees is frivolous based on the relief sought in this appeal and law with respect to potential fee awards.

JPay requests that the Trial Court's Orders be affirmed.

III. SUMMARY OF ARGUMENT

Software designed for JP4s turned out to be incompatible with JP3s, which incompatibility resulted in JP3s malfunctioning. There is no evidence this software incompatibility issue was intended—moreover, it makes no business sense for JPay to intentionally sabotage the devices its customers use to download media content. Once JPay discovered the likely cause of JP3 malfunctions, JP3 users were given free upgrades to the newest model of player.

Appellants appear to argue that regardless of whether the software issue was intentional or not, JPay should be required to provide a lifetime warranty that guarantees JP3 devices and software will be maintained and serviced forever. This argument completely ignores the User Agreement and Limited Warranty that came with JP3s. Appellants' argument also defies reasonableness—no business can be required to make the same exact product forever.

JPay did not violate the terms of its User Agreement or Limited Warranty. JPay did not violate the terms of its contract with DOC. JPay did not breach any recognizable duty owed to Appellants. JPay did not violate any statute. JPay acted in a commercially reasonable manner. It is

regretful there was any disruption in services for Appellants and other JPay users. But the short disruption of services, which JPay remedied by making new models available for free, did not cause Appellants any damages.

Additionally, Appellants' have no legal claim for damages regarding the prices charged by JPay for downloads. There is no evidence that JPay's pricing is unreasonable or violates JPay's contract with DOC. Appellants' contention that the prices are too high is simply their opinion. Further, Appellants can use their devices to listen to the radio and for communicating without purchasing song downloads.

JPay's position in this case was thoroughly briefed to the Trial Court. The Trial Court made the correct decision based on the facts and applicable law. Appellants' Opening Briefs do not present any compelling arguments for reversal and/or new arguments on relevant points of law that JPay's prior briefing does not already address. The bottom line is JPay acted reasonably and did not violate any contract—JPay's conduct does not give rise to a claim for damages.

IV. ARGUMENT

A. Standard of Review.

Appellants' assignments of error deal with one Order granting

summary judgment (and subsequent Order denying reconsideration), one Order denying a request for continuance pursuant to CR 56(f), and one Order denying a request to compel discovery.

- A grant of summary judgment is subject to *de novo* review. *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 173-74, 68 P.3d 1093 (Div. 2 2003).
- A Trial Court's denial of a CR 56(f) motion for continuance is reviewed for manifest abuse of discretion. *Manteufel*, 117 Wn. App. at 175 (citing *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400, 928 P.2d 1108 (Div. 3 1996)). "Such discretion is not abused if (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Manteufel*, 117 Wn. App. at 175 (citing *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (Div. 1 1989)).
- A Trial Court's denial of a motion to compel discovery is reviewed for abuse of discretion. A Trial Court may only be found to have abused its discretion when its decision is based on unreasonable or

untenable grounds. *Clarke v. State Attorney General's Office*, 133 Wn. App. 767, 777, 138 P.3d 144 (Div. 2 2006) (citing *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 759, 125 P.3d 164 (Div. 1 2005); *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)).

The parties in this case appear to be in agreement as to the relevant standards of review.

B. The Trial Court's Order granting summary judgment (and denying Appellants' subsequent Motion for Reconsideration) should be affirmed.

JPay filed an approximately twenty-page dispositive motion with the Trial Court and a ten-page reply. CP 90-111 and 513-523. JPay also filed a five-page response to Appellants' Motion for Reconsideration filed with the Trial Court. CP 495-500. And JPay filed Declarations in support of summary judgment, namely the Declaration of Shari Katz. CP 84-89. In the thirty-plus pages of previously filed pleadings and in the supporting Declarations, JPay set forth the relevant facts and law with respect to each of Appellants' causes of action. *See, e.g.*, CP 90-111. JPay also pointed out that something was glaringly missing from Appellants' Complaints—any breach of contract or UCC cause of action. CP 90-111. At the end of

the day, the crux of JPay's argument, which defeats all of Appellants' claims is this: JPay acted reasonably and did not violate any contract. CP 90-111.

It is unclear how Appellants' seven alleged assignments of error with their seventeen sub-issues apply to Appellants' causes of action. In JPay's Motion for Summary Judgment, each cause of action was separately discussed and JPay explained how each cause of action failed for lack of evidence relating to particular elements of the respective causes of action. CP 98-108. Then in the last section of JPay's Motion for Summary Judgment, JPay explained that, in addition to all of Appellants' claims lacking certain elements, Appellants' causes of action universally failed because there was no evidence of damages. CP 108-109. None of the arguments in Appellants' eighty-plus pages of their Opening Briefs and none of the eighty-one cases cited by Appellants changes JPay's view of this case.

JPAY relies on the facts and arguments previously set forth in pleadings filed with the Trial Court. This Court must review that record *de novo*. JPay requests that this Court affirm the Trial Court's decision. There is simply no evidence in this case that JPay acted unreasonably and there is

no evidence that Appellants were damaged.

C. The Trial Court did not abuse its discretion in denying Appellants' Motion for a Continuance.

In addition to the approximately twenty-page dispositive motion and ten-page reply referenced above, JPay filed a five-page response to Appellants' Motion for CR 56(f) Continuance. CP 112-116. Appellants have filed nothing since JPay's response was filed and/or since the Trial Court ruled on this matter that has changed JPay's position.

As previously stated, software incompatibility is the likely cause of Appellants' JP3 malfunctions—there is no issue of fact in this regard. Appellants allege there was some kind of bad intent on JPay's part to cause the software incompatibility, but intent is only an element of a couple of Appellants' claims—and where intent is an element, Appellants' claims fail on the issue of damages. Damages are up to Appellants to prove with their own evidence. JPay does not possess evidence of Appellants' alleged damages and so no amount of discovery propounded to JPay would reveal evidence of damages.

Even if intent were a relevant issue, Appellants fail to explain how intent can be determined from the discovery they requested. Intent cannot be gleaned from a printout of computer code. And it would be preposterous

to allow Appellants to go on a fishing expedition in the hopes that Appellants might get one person to say something they could construe favorably. Logic and the evidence submitted in this case go against Appellants' claims.

Even assuming there were no concerns about privacy, privilege, and/or the burden/expense of allowing the discovery requested by Appellants, there is simply no evidence that the information Appellants seek would create an issue of material fact. The discovery Appellants have described wanting would not show evidence of intent. And besides, intent only becomes relevant if Appellants can prove damages, which they failed to do. The Trial Court did not abuse its discretion in denying a continuance.

D. The Trial Court did not abuse its discretion in denying Appellants' Motion to Compel.

Appellants' discovery motion is a moot point provided the Trial Court's other Orders are affirmed. There is clearly no reason to conduct discovery in a case that has been dismissed—and as previously set forth, the requested discovery would not have led to genuine issues of material fact. The Trial Court's denial of Appellants' discovery motion goes hand in hand with the Trial Court's denial of Appellants' request for a continuance. Indications from the Trial Court that some discovery may

have been permitted had other rulings been different is not evidence of an abuse of discretion. The Trial Court's rulings were consistent and should be affirmed.

To the extent this case is reversed and remanded, which could make the discovery issues relevant, JPay stands behind the objections and argument previously noted to the Trial Court. CP 117-123.

E. Appellants are not entitled to fees on appeal.

Appellants, who are *pro se*, appear to be requesting costs on appeal, including reasonable attorneys' fees. In the unlikely event this case is reversed and remanded to the Trial Court for further proceedings, Appellants would still not be entitled to an award of fees on this appeal. And it would be unjust to award costs to Appellants at this stage. Appellants do not automatically prevail in their lawsuit if the Trial Court's decisions are reversed. Appellants would still be required to prove their case. In other words, a party does not prevail on a given claim just because the opposing party may be denied summary judgment.

There is no basis to award fees under the Consumer Protection Act to a party who simply survives summary judgment, which is the best Appellants can hope for here. And there is no basis to award Appellants


anything pursuant to a contract because Appellants did not raise contract claims in their Complaints and have not cited to the language of any contract that might award them fees. Appellants' request for fees is a moot point, in JPay's estimation, as the Trial Court's Orders should be affirmed, but in no event should Appellants be awarded costs and fees.

V. CONCLUSION

For the foregoing reasons, JPay requests that the Court of Appeals affirm all Orders and rulings of the Trial Court.

RESPECTFULLY SUBMITTED this 3rd day of January 2017.

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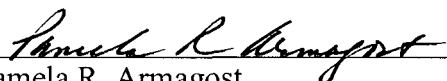
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 3 day of January, 2017, at Olympia, Washington.


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